Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(I)-98 AND 96–12 OF 2012(W)
HASHIM YUSOFF, SURIYADI, AHMAD MAAROP, ZALEHA ZAHARI AND JEFFREY TAN FCJJ
8 OCTOBER 2013

Civil Procedure — Appeal — Appeal to Federal Court — Whether appeals incompetent and ought to be struck out in limine — Whether appeals based on applications which were inherently defective for non-compliance with High Court's rule — Whether applications sought to set aside court orders never appealed against — Whether Federal Court could refuse to answer questions posed for determination if requirements of s 96(a) of the Courts of Judicature Act 1964 not satisfied — Whether r 106 of Rules of the Federal Court 1995 empowered court to strike out appeal in appropriate case

Having granted the appellant leave to appeal on certain questions of law he had framed for the court's determination, the Federal Court at the appeal hearing found that the appeals before it were not maintainable as the initial applications upon which the appeals were based were defective. The two applications, encls 129 and 130, were made by the appellant in the High Court to set aside a series of orders ('the various orders') that were issued against him, viz an order that he settle his judgment debt to the respondent in instalments ('the payment order'), committal orders taken out by the respondent on his failure to obey the payment order and a warrant of committal issued by the High Court after it found him to be in contempt of court. Although he had been duly served at each stage of the proceedings for the hearing of applications and for compliance with orders of court, the appellant had persistently failed/refused to attend hearing dates or to comply with any of the orders. Neither did he appeal against any of the orders that were served on him. Ultimately, he applied to set aside the various orders vide encls 129 and 130, after about a year's delay and in doing so he not only failed to explain the reason for such delay; he also failed to apply for extension of time to file the said applications.

Held, striking out the appeals in limine with costs:

(1) The appeals before the Federal Court were incompetent as there was no appeal filed against the judgment debt order, the amended payment order or the committal order of 5 November 2008 which culminated in the warrant of committal being issued against the appellant (see para 10).

(2) Enclosures 129 and 130 were also incompetent as no enlargement of time

was ever applied for by the appellant prior to the filing of those applications and no reasonable explanation was given for the delay of at least a year before they were filed. Despite knowing that encls 129 and 130 were filed pursuant to O 42 r 13 of the Rules of the High Court 1980, which required an application to set aside a judgment/order to be made and served within 30 days of receipt of the judgment/order, the appellant had disregarded the time factor prescribed to regularise the applications (see para 13).

(3) The failure to adhere to the preliminary requirement to extend time in the circumstances of the case had to be dealt with strictly, as otherwise rules requiring an extension of time would end up as a dead letter. The rules, prima facie, must be obeyed for otherwise the party in breach of them would defeat the very purpose and object of the need to observe the time-line (see para 14).

(4) The court was not prevented from refusing to answer the questions posed for its determination, despite leave to appeal having been granted, if the requirements of s 96 (a) of the Courts of Judicature Act 1964 were not satisfied. Exacerbated, in this case, by the want of extension of time and given the ancillary powers of the court under r 106 of the Rules of the Federal Court 1995, the appeals were struck out with costs (see paras 15–18).

[Bahasa Malaysia summary

Setelah memberikan perayu izin untuk merayu atas soalan-soalan undang-undang tertentu yang dirangkanya untuk penentuan mahkamah, Mahkamah Persekutuan mendengar rayuan mendapati bahawa rayuan-rayuan di hadapannya tidak boleh dikekalkan memandangkan permohonan-permohonan permulaan atas mana rayuan-rayuan didasarkan adalah cacat. Dua permohonan, lampiran 129 dan 130, dibuat oleh perayu di Mahkamah Tinggi untuk mengetepikan siri perintah ('perintah pelbagai') yang dikenakan terhadapnya, iaitu perintah yang mana dia telah menyelesaikan hutang penghakimannya kepada responden dalam bayaran ansuran ('perintah bayaran'), perintah komital yang diambil oleh responden ke atas kegagalannya untuk mematuhi perintah bayaran dan waran komital yang dikeluarkan oleh Mahkamah Tinggi selepas dia mendapatinya menghina mahkamah. Walaupun dia telah diserahkan pada setiap peringkat prosiding untuk pendengaran permohonan dan untuk mematuhi dengan perintah-perintah mahkamah, perayu berterusan gagal/enggan menghadiri tarikh pendengaran atau untuk mematuhi dengan apa-apa perintah tersebut. Dia juga tidak merayu terhadap apa-apa perintah yang dikenakan ke atasnya. Akhirnya, dia memohon untuk mengetepikan perintah pelbagai tersebut melalui lampiran 129 dan 130, selepas lewat setahun dan dalam berbuat demikian dia bukan sahaja gagal untuk menjelaskan sebab untuk kelewatan sedemikian; dia juga gagal untuk

memohon untuk pelanjutan masa untuk memfailkan permohonan-permohonan tersebut.

Diputuskan, membatalkan rayuan-rayuan *in limine* dengan kos:

(1) Rayuan-rayuan di hadapan Mahkamah Persekutuan tidak kompeten memandangkan tiada rayuan difailkan terhadap perintah hutang penghakiman, perintah bayaran yang dipinda atau perintah komital bertarikh 5 November 2008 yang mana memutuskan waran komital dikeluarkan terhadap perayu (lihat perenggan 10).

(2) Lampiran 129 dan 130 juga tidak berkompeten memandangkan tiada pelanjutan masa dipohon oleh perayu sebelum pemfailan permohonan-permohonan tersebut dan tiada penjelasan munasabah diberikan untuk kelewatan sekurang-kurang setahun sebelum ia difailkan. Meskipun mengetahui bahawa lampiran 129 dan 130 difailkan berikutan A 42 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980, yang mengkehendaki permohonan untuk mengetepikan penghakiman/perintah dibuat dan diserahkan dalam masa 30 hari selepas penerimaan penghakiman/perintah, perayu tidak mengendahkan faktor masa yang ditetapkan untuk membuatkan permohonan-permohonan tersebut mengikut keadaan (lihat perenggan 13).

(3) Kegagalan untuk mematuhi kepada kehendak awal untuk melanjutkan masa dalam keadaan kes mesti dikendalikan dengan betul, jika tidak kaedah yang mengkehendaki pelanjutan masa akan berakhir sebagai tidak berfungsi. Kaedah-kaedah, prima facie, mesti dipatuhi jika tidak pihak yang memungkirinya akan menggagalkan tujuan dan objektif sebenar perlunya untuk mematuhi garis masa (lihat perenggan 14).

(4) Mahkamah tidak dihalang daripada menolak menjawab soalan-soalan yang dibangkitkan untuk penentuannya, walaupun izin untuk merayu telah diberikan, jika kehendak s 96 (a) Akta Mahkamah Kehakiman 1964 tidak dipenuhi. Bertambah buruk lagi, dalam kes ini, dengan kehendak pelanjutan masa dan dengan kuasa sampingan mahkamah di bawah k 106 Kaedah-Kaedah Mahkamah Persekutuan 1995, rayuan-rayuan dibatalkan dengan kos (lihat perenggan 15–18).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 870–893.

Cases referred to

Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors [2002] 7 MLJ 430; [2002] 3 CLJ 108, HC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2008] 6 MLJ 636; [2009] 2 CLJ 1, FC (refd)
Ong Guan Teck & Ors v Kasturi [1982] 1 MLJ 105; [1982] CLJ (Rep) 616 (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257, FC (refd)
Tan Kong Min v Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (refd)
VVDN Sockalingam Chettiar And Two Others v KRPRSM Somasundaram Chettiar [1941] 1 MLJ 103, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Rules of the High Court 1980 O 3 r 5, O 42 r 13
Rules of the Federal Court 1995 r 106
Rules of Court 2012 O 48

Appeal from: Civil Appeal Nos W–02(1M)–2869 and 2870 of 2010 (Court of Appeal, Putrajaya)

Lambert Rasa-Ratnam (Mong Chung Seng with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Sharmala Batumalai (Mabel Nirmala James with her) (Hamzah, Sulaiman & Partners) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] Two appeals were heard simultaneously before us namely Civil Appeals 2(i)–96 of 2012(W) and 2(i)–98–12 of 2012(W). The questions for our determination pertain to the powers of a court to direct payment by instalments of a judgment debt under O 48 of the Rules of the High Court 1980 (now O 48 of the Rules of Court 2012), and whether a judgment debt could be enforced by an order of committal.

[2] The questions emanate from encls 129–130 filed by the appellant. They relate to the payment order of 12 October 2006 as amended on 29 November 2007 (served on 9 January 2008) and a committal order dated 5 November 2008 (served on 14 January 2009), and a further committal order and warrant of committal both dated 10 April 2009. No appeals were filed against any of those perfected orders.

[3] The amended payment order, together with the committal order of 5 November 2008, which were properly served were also never set aside within 30 days after their service. The 30 day rule is provided for under O 42 r 13 of

the Rules of the High Court 1980 ('RHC'). The committal order and warrant of committal, both dated 10 April 2009, are awaiting execution.

[4] Instead of complying with the requirements of O 42 r 13 of the RHC after being served with those orders, the appellant did nothing for a year. On 19 April 2010 he suddenly woke up and filed two setting aside applications namely the abovementioned encs 129 and 130. Vide those enclosures the appellant wanted to set aside the served amended payment order, the committal order of 5 November 2008 (served on 14 January 2009) and the 14 April 2009 committal order and warrant of committal. The appellant also wanted to set aside the last two perfected orders despite having failed to purge his contempt pursuant to the 5 November 2008 committal order. It must be understood that the 14 April 2009 orders stemmed from the order of 5 November 2008 and unless the latter was satisfied and resolved, the application to set aside the 14 April 2009 orders was doomed to fail.

[5] By some oversight, and without ensuring their competency, these two enclosures were heard by the High Court and the Court of Appeal on the merits. They were respectively dismissed with costs by the High Court and the Court of Appeal on 10 October 2010 and 15 June 2012. The appellant filed a successful leave application, hence the appeal before us.

[6] Instead of answering the questions posed for our determination we have decided to strike out these appeals in limine ie on the preliminaries. To understand our reasoning it will be quite useful if we lay down the background facts first.

CHRONOLOGY OF EVENTS

[7] The respondent had obtained a money judgment (the judgment debt) against the appellant after a full trial on 31 December 1999. The sealed order was served on the appellant's solicitors but the judgment debt remained unpaid. No appeal was filed or applied to be set aside by the appellant. On 12 December 2005 an order was obtained to examine the judgment debtor. On 15 July 2006 the said 12 December 2005 order was served personally on the appellant wherein he was directed to attend court on 30 August 2006. Solicitors for both parties attended court on the given date but matters were adjourned to 12 October 2006. Vide a letter from the respondent's solicitors, the appellant was directed to attend court on 12 October 2006 for the hearing of the JDS.

[8] When the appellant failed to appear on the given date, the respondent obtained an order for payment of the judgment debt in instalments (payment order). After 30 attempts to serve the payment order on the appellant it was eventually served personally on 12 October 2006. Again no appeal or application to set aside that payment order was filed despite it being served. Given the fact that the time to make payments in the said order had expired, an application was made on 22 August 2007 to amend it. That application was served on him, but again on 29 November 2007 the application was heard in his absence, whereupon an order in terms was granted. On 9 January 2008 the payment order as amended was served personally on the appellant. Again there was no appeal or any application filed to set aside.

[9] History repeated itself when the appellant failed to make payments on the due dates and the respondent proceeded to obtain leave to issue committal proceedings at the High Court. On 5 November 2008, the High Court granted the committal order in the absence of the appellant, after being satisfied that the appellant had been served with all the necessary papers. The committal order of 5 November 2008, together with the accompanying court's covering letter, supported by the translations, were served personally on the appellant by the court bailiff on 14 January 2009. As that order suffered short service, the matter was postponed until it was eventually heard on 10 April 2009. Unfortunately, and not surprisingly, again the appellant refused to attend court despite the documents having been served on him. On that date the court granted a committal order and warrant of committal as he had been found guilty of contempt; for this contempt the appellant was committed to prison for four months from the date of arrest. These orders were regular orders, which merely needed enforcement, hence the warrant of committal.

[10] As said earlier, we have decided to strike out these appeals in limine as we find the appeals before us incompetent. Our reasons are obvious. At the risk of repetition, there was no appeal filed against the judgment debt order, the amended payment order, or the committal order of 5 November 2008 which culminated in the warrant of committal being issued against the appellant.

[11] As appeals are creatures of statute, and none were filed at any time against all of the orders issued against the appellant in this case, we shall refrain from discussing the effect of that failure except to state that no variation of a judgment regularly obtained after it has been entered or an order after it is drawn is permitted, unless it falls under the slip rule (*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143). What is left is the right of the appellant to set aside those orders as reflected by his applications. As mentioned earlier, the relevant provision for any setting aside application falls under O 42 r 13 of the RHC, and it reads:

A Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

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[12] In other words a parry intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within thirty days after receipt of the order or judgment by him. If the application is made outside the thirty day period, unless time is enlarged, C the application must fail (*Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 3 CLJ 108). Whether an enlargement of time will be granted, on the premise that an application was been filed, will depend very much on the facts and circumstances of that application (*VVDN Sockalingam Chettiar And Two* D *Others v KRPRSM Somasundaram Chettiar* [1941] 1 MLJ 103 (CA)).

[13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls 129–130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was E out of time by at least a year. Despite knowing that encls 129–130 were filed pursuant to O 42 r 13 of the RHC the appellant had disregarded the time factor prescribed to regularise the application. With no application filed to extend time pursuant to O 3 r 5 of the RHC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), F encls 129–130 were incompetent.

[14] The failure to adhere to the preliminary requirement to extend time in the circumstances of the case must be dealt with strictly, as otherwise the rules requiring an extension of time will end up as a dead letter. They, prima facie, G must be obeyed for otherwise the party in breach of the rules will defeat the very purpose and object of the need to observe the time line (as an analogy see *Ong Guan Teck & Ors v Kasturi* [1982] 1 MLJ 105; [1982] CLJ (Rep) 616.

H **[15]** What about the fact that leave was granted earlier in this appeal hence mandating this court to answer the questions? We hold the view that this court is not prevented from refusing to answer the questions for determination on certain legal grounds despite leave having been granted. We refer to two cases justifying our position. In the case of *Karya Lagenda Sdn Bhd v Kejuruteraan* I *Bintai Kindenko Sdn Bhd & Anor* [2008] 6 MLJ 636; [2009] 2 CLJ 1, referring to the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257 the Federal Court remarked:

The respondent's counsel also submitted that even though leave had been granted on the four questions, yet as decided by the Federal Court in *Sri Kelangkota* (sic), the Federal Court was not prevented from reconsidering the issue of whether leave ought to have been granted in the first place. In that case, the respondent's counsel submitted similarly to the situation as in this case, where it was decided at p 369:

> Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s 96(a) of the CJA and therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

We agree with the learned counsel that the same approach need to be taken by us in this case, as we also find that the questions posed are questions of fact and not questions of law. We also find that the questions 'do not involve a question of importance upon which further argument and a decision of this court would be to public advantage'. There is no necessity or purpose for this court to answer the questions. (Emphasis added.)

[16] The case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* was also referred to in the case of *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 which likewise held that the court was entitled not to answer the questions on the ground that they did not come within the ambit of s 96(a) of the Courts of Judicature Act 1964.

[17] We now refer to r 106 of the Rules of the Federal Court 1995, which empowers us to strike out this appeal and it reads:

> 106 Ancillary powers of the Court.
>
> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all power which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[18] Alluding to the same reasoning as discussed in the above cases of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor*, *Karya Lagenda Sdn Bhd* and *Tan Kong Min v Malaysian National Insurance Sdn Bhd*, which entitle us to refrain from answering the leave questions if the requirements of s 96(a) of the

CJA are not satisfied, exacerbated by the want of extension of time, and empowered by r 106, the appeals are hereby struck out with costs.

Appeals in limine struck out with costs.

Reported by Ashok Kumar